UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HERMÈS INTERNATIONAL and HERMÈS of PARIS, INC.,

Plaintiffs,

-against- 22 CV 384(JSR)

MASON ROTHSCHILD,

Defendant.

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United States Courthouse
White Plains, New York

May 4, 2022

(All parties appearing via teleconference)

THE HONORABLE JED S. RAKOFF,
District Court Judge

BAKER & HOSTETLER LLP (NYC)
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BY: REBECCA TUSHNET

THE COURT: This is Judge Rakoff. Would counsel please identify themselves.

MR. WARSHAVSKY: Good afternoon, your Honor. This is Oren Warshavsky of Baker & Hostetler for the plaintiffs.

THE COURT: Good afternoon.

MS. TUSHNET: Good afternoon, your Honor. This is Rebecca Tushnet from Lex Lumina. I represent the defendant, Mason Rothschild.

THE COURT: Good afternoon.

So we're here on the motion to dismiss. Let me hear, first, from moving counsel.

MS. TUSHNET: Thank you, your Honor. I'd like the reserve some time for rebuttal, please.

THE COURT: My practice is to give rebuttal, surrebuttal, and so forth until everyone's either exhausted or has lost their voice. So don't worry about that.

MS. TUSHNET: Thank you, your Honor.

This case is about the difference between a handbag and a picture of a fanciful, fake-fur covered handbag. Like Andy Warhol, Mason Rothschild made art. His art sold online as NFTs, which serve here as certificates of authenticity. Because Rothschild made art, and because this is not a title versus title case, *Rogers v. Grimaldi* applies, and Hermès has not plausibly pled that the art is explicitly misleading, or that Rothschild's use of MetaBirkins lacked artistic relevance

to his methods. But this is not unfair, it's necessary for a free society that trademark owners do not get to tell artists what they can depict.

Dismissal here is required to prevent chilling effects on artists who will know otherwise that they can only depict famous brands if they can spend hundreds of thousands of dollars for a successful defense.

The objective requirements of *Rogers*, artistic relevance and explicit misleadingness, are evidenced on face of the work and discovery will not add relevant evidence or make explicit misleadingness or lack of artistic relevance plausible. *Rogers* clearly mapped out what was explicitly misleading and what was --

THE COURT: Let me ask you preliminarily about *Rogers*. Assuming arguendo that the *Rogers* test applies, *Rogers* was decided on an appeal of summary judgment. So your adversary says that it doesn't, even assuming it otherwise would apply, it still requires balancing the artistic nature of the digital images and Rothschild's own intent and so forth and that that's not appropriate on a motion to dismiss. What about that?

MS. TUSHNET: Three points, your Honor.

First, in fact, courts in this circuit routinely dismiss cases on a motion to dismiss in *Rogers* situations. So we cited *Brown v. Showtime Networks* and *Louis Vuitton v. Warner*

Brothers. They cited *Medina v. Dash Films* and *Gayle v. Allee*. These are all on a motion to dismiss. There are a number of others, in fact.

But second, in terms of rationale, *Rogers* provides all the necessary guidance here. It expressly holds that ambiguous or explicitly misleading titles are not actionable, and it offers examples of what would be explicitly misleading, things that would be apparent on the face of the work. No amount of discovery will change what's on the face of the work, and *AM General v. Activision* said very clearly and correctly, no amount of evidence showing consumer confusion can satisfy the explicitly misleading prong of the *Rogers* test because that evidence goes only to the impact of the use on a consumer. So the parts of *Rogers* simply don't require this kind of fact finding.

In addition, it's clear from the complaint and from the exhibits that Rothschild is adamant that he's a creator. So paragraph 100 of the complaint admits that the claim here is one of implications not explicitness. Then Hermès in 104, 105 complains that the disclaimer of affiliation with Hermès is too much. Even if Hermès doesn't like it, it negates any possibility of explicit misleadingness. And in fact, their complaint that Rothschild was using too much disclaimer highlights the wisdom of distinguishing explicit statements from implication. Hermès wants you to infer a connection from

both having a disclaimer and not having a disclaimer. That's exactly what *Rogers* instructs courts not to do, even if some confusion might be reasonable under the circumstances.

THE COURT: Okay.

MS. TUSHNET: So I do want to go back, if I may, and actually address the question of does *Rogers* apply, because you said assume arguendo.

THE COURT: Yes, right.

MS. TUSHNET: And there are difficult questions about art but whether static two-dimensional images are art is not one of them. Images are at the core of what the Supreme Court has for nearly 100 years protected under the First Amendment. Representations of real and unreal things are art. Warhol's paintings are art. These are not functional. There are no allegations that you can put things in them, even within the metaverse, and as such, they are pure representation and therefore clearly, as was covered by *Rogers*, as the Constitution requires. *Rogers* points out that it's actually the First Amendment that drives this interpretation of the Lanham Act, it's not statutory. It is the nature of noncommercial speech, which includes speech that's sold for profit, that makes it different from ordinary commercial products like a Birkin or can of soup.

So whatever might be possible in the metaverse at large, Hermès can't and hasn't alleged that these artworks are

anything other than two-dimensional artworks.

THE COURT: What if the digital images that you're selling had the word MetaBirkins in the image itself not just in the title, would that change things?

MS. TUSHNET: Your Honor, I don't think so, because the question would still be about explicit misleadingness. Of course, in *Rogers v. Grimaldi*, when they distribute the movie, it actually had *Ginger & Fred* printed on the copies of the movie. This is also, of course, true of *AM General* with the Hummer shown in the advertising in the game itself, and in fact, all the other cases decided under *Rogers*, including cases like *Medina* and *Brown* and *Louis Vuitton v. Warner* where they advertise the Louis Vuitton scene in the movie as a means of touting the movie. So I think that's actually inherent in *Rogers*.

THE COURT: Okay.

MS. TUSHNET: And I want to say a little bit more about what the art is here, because Andy Warhol depicted mass-market objects at the height of 1960s mass culture. Half a century later, there is much greater inequality and a focus on exclusivity. And to interrogate current culture it makes sense for Rothschild to make art about literally unobtainable luxury. He creates images of Birkins that don't exist. He actually challenges us to say, okay, what is luxury? Why do you value what you value? Do you value it just because of the

image? If that's so, that's something worth thinking about in modern culture, and worth thinking seriously about whether this is the kind of thing that we all want to be paying for, images detached from any reality, and maybe we do and maybe we don't. He might be a good artist, he might be a bad artist. People have very different opinions on Warhol and always have, but he is still an artist. He makes his art through communication and not through selling physical objects. I also -- excuse me.

THE COURT: Go ahead.

MS. TUSHNET: I just wanted to make a point about the confusion that Hermès attempts to create in its briefing by merging together *Rogers* cases and title versus title cases that are influenced by *Rogers*. So *Rogers* points out that the categorical balancing that it mandates has to be different when the plaintiff itself is known for and has the foundation of its right in its own creative work, such as *Gone with the Wind* that it's known for.

In a *Rogers* case, it's not a title versus title case, so you do *Rogers* uninflected with anything else. And you can see that from *Rogers* itself, which only considers explicit misleadingness and artistic relevance. It doesn't do any *Polaroid* balancing. Cases after Rogers in the same vein, like *AM General*, mention the *Polaroid* factors, but if you look at them, actually don't do *Polaroid* balancing, because the *Polaroid* factors generally go to implicit misleadingness not

explicit misleadingness. Title versus Title cases are different. You still have to take account of the First Amendment, but because of the greater potential for confusion, you do a First Amendment inflected *Polaroid* analysis, still giving very heavy weight to the First Amendment interest in free expression. But they're not the same, and Hermès' foundation of its right is not in a title, that no *Polaroid* analysis is required.

THE COURT: Okay. I think maybe it's time to hear from plaintiffs' counsel, then we'll come back to defense counsel.

MR. WARSHAVSKY: Thank you, your Honor.

Your Honor, I think I would start with how my adversary defined the issue. The issue is the title for artworks. And I think my adversary's argument here is really about the case that they think they've pleaded or maybe one that they expect to happen after discovery rather than what's in our complaint. And what I would start with -- I'll address the title piece shortly -- but what I would start with is all the uses -- well, let me take a step back.

Our complaint alleges trademark infringement through a real -- a series of conduct, a real course of conduct over a few month period. And much of that, much of those all allegations have nothing to do with a title of the artwork, they have to do with the opening of storefronts under the name

MetaBirkins. It has to do with a web page called MetaBirkins. It has with a Twitter handle and an Instagram account called MetaBirkins, all of which promote sales, all of which link to storefronts.

In point of fact, also in our complaint, if your Honor would like, I can cite you to paragraphs. Might take a moment but I can do.

The defendant has actually marketed other NFTs under the MetaBirkins brand. In effect, in our complaint, we actually point to the fact that the defendant has created these hashtag campaigns using the MetaBirkins' mark, and in point of fact his contributors for other, the non-MetaBirkins NFTs still use those MetaBirkins hashtag campaigns. In all those instances, MetaBirkins is being used as a trademark not as a title to anything. But then when we talk about, well, what are NFTs and is this artwork, and we heard an interesting discussion from Professor Tushnet, but what I would suggest is that we look at, rather than the commentary about what we believe the NFTs are meant to be commentary about and actually compare it to the defendant's own words. And in that, your Honor, I would turn to Exhibit Y of the complaint, which is a Yahoo finance article, and beginning at the bottom of the first page, Mr. Rothschild, we'll call him a defendant, I'm not sure what his real name is, he says, he starts by saying, "I mean, for me, there's nothing more iconic than the Hermès Birkin bag.

And I wanted to see, as an experiment, if I could create the same kind of illusion that it has in real life as a digital commodity." So he's calling it a commodity, not a work of art.

Later, in the same paragraph, he says, "Because I feel like there's nothing stronger in this NFT space than community and being able to garner the attention and build a relationship with the consumer."

Later, further down on the second page of this article, again at Exhibit Y, Mr. Rothschild is speaking and he says, "I was explaining to somebody before, there's not much difference between having the crazy car or the crazy handbag in real life because it's kind of just that, that showing of like wealth or that kind of explanation of success. And now you're able to bring that into the metaverse with these iconic NFTs that have fetched crazy amounts of money."

If we skip to the bottom of that page, again, it's the second page, he's asked by the interviewer, it's the last question, the interviewer asks, "But do you have to look out for counterfeiting, you know, in the NFT space?"

The defendant answers, "100 percent. Actually, like before my collection dropped, there was a bunch of like counterfeit NFTs that weren't from my collection. We're in the process of like verifying mine on OpenSea." Skipping a little, further down he says, "So, yeah, like counterfeits are definitely there."

And I'm going to stop at that, your Honor, because what is a counterfeit? What is the defendant -- let's take the defendant at his own words. The defendant is not saying he's saying artwork, he's not saying he's commenting, he is telling you very plainly that he is trading off on the goodwill of Hermès and he's doing so to make money because there's a blurred distinction. Because people just like they will pay for an iconic bag, he's hoping they'll pay for what he calls a digital commodity, and he once said others seeing the value are counterfeiting his MetaBirkins. So he may think he's a terrific craftsman, but your Honor, so are the people selling fake Rolexes and fake Hermès bags near the courthouse. Those are genuine -- I'm sorry, they're not genuine, they're far from genuine. Actually, they're great craftsmanship. A lot of people can't tell them apart. Certainly there's artistic value to any of this. It doesn't allow for trademark infringement. Here, what's happening is the defendant is trying to cash in on Hermès' name and he has succeeded.

Mr. Rothschild, or again, whatever his name is, his other works sell for nothing. These sell for the same price as Birkin bags. Then we can look to the confusion. I know for trademark infringement we look to likelihood of confusion, but at this stage I think I would just point -- we can go through those factors, but I would point to the actual confusion.

Not surprising, because he's adopted the entire

Birkin trademark, Mr. Rothschild has confused *Elle* magazine, he confused the *New York Post* fashion reporters, he confused an intellectual property attorney giving a speech on NFTs and the metaverse speaking at an intellectual property conference. He confused another journal called *L'Officiel*, I think. It's all cited in our complaint. But he's also confused consumers. Consumers, you can see, we've quoted a few in our complaint, but they thought -- not only did they think it was from Hermès, not only did they complain, they thought it was somehow attached to a real Hermès bag, because that's what others have done.

So I think, your Honor, when you look at the totality of the defendant's conduct, this is trademark infringement. It's no more, no less.

THE COURT: If I were to conclude that your complaint does not plausibly allege that Rothschild is currently selling digital handbags, would I then have to grant the motion?

MR. WARSHAVSKY: Not at all, your Honor. I think we've gone through the likely -- I hope we've gone through, in a good way, the likelihood of confusion analysis, but it never has to be the same goods. Trademark infringement is about whether or not -- the touchstone is a likelihood of confusion and is the eight *Polaroid* factors, and it goes through whether consumers would be confused. And in fact, one of the factors is likelihood, whether there's a likelihood of bridging the

gap. And the likelihood of bridging the gap, it starts with the assumption that the trademark owner is not in the space. And there's plenty of cases, and I don't think we've cited them, because I don't think we anticipated that question, but we're happy to send you that, if you'd like, plenty of cases where an infringer is not allowed into a certain zone where those goods would confuse the ultimate consumer.

But, your Honor, it's not just trademark infringement that's alleged in our complaint. There's also cybersquatting from taking the name, which is pretty simple, but also dilution. And that one, I think if you look at the test for dilution, I think, again, we could -- Mr. Rothschild's interview from *Yahoo Finance* would certainly cover that, but certainly seems to hit the entire test, but we discuss that, I think it's on page 15 of our opposition, but that dilution assumes that -- or can include certainly cases where it's different goods.

So I think under any of our causes of action the identity of the goods is not the touchstone for the test. It could be relevant.

And your Honor, I'm not sure that -- your Honor, I feel like through the briefing we used the term digital handbag because that's what was being used in some places. Other places he used commodity. I don't really know, in fairness, what they call this other than it's an NFT, it's a digital

commodity, it looks like a handbag. Whether it can be used to store a phone. I just don't know. I don't know enough. I don't know that we know enough right now to get there.

What we're complaining about is the use of the name. In fact, your Honor, I guess one point I would say with respect to all of these is Birkin is not a word that otherwise exists in the English language. Birkin is a term that's unique, and people hear the term Birkin, and we've alleged this in the complaint, and we've given a lot of support for it, people hear the word Birkin and they assume that it's Hermès, and everybody identifies it with the iconic Hermès Birkin bag, much like they would with Coca Cola. If you hear Coca Cola -- if I see a shirt that says Coca Cola, just because it's not a soft drink doesn't mean it wouldn't be confused or that it might not be confused that it's Coca Cola authorized or somehow associated with or affiliated or endorsed by Coca Cola.

I don't know if I've answered your question.

THE COURT: Yes, you have.

MR. WARSHAVSKY: Okay.

THE COURT: So anything else you wanted to say?

MR. WARSHAVSKY: I don't think so. I might just touch, your Honor, on the issue with the disclaimer. I think we plead, and I think the law is pretty good in this regard, your Honor, that a disclaimer, first of all, a lot of disclaimers don't work. Some of them actually sow seeds of

confusion. Here, whether a disclaimer works or doesn't work would be an issue of fact at the very least, and frankly, the disclaimer is only on one of these storefronts. So I think to the extent the defendant wants to seek some sort of safe harbor in the fact that one of the storefronts during the sale may have had a disclaimer, the fact the rest didn't and he continues to market certainly doesn't.

And I would also, your Honor, point -- I guess there's a disclaimer after the fact is also looked at differently, that's the *Chambers* case, your Honor.

And I would also, I think, go back to one other point about the fact that this is a trademark usage, your Honor, which is that we've alleged in our complaint, and obviously we think it's true, that the defendant actually has said he's going to set up a MetaBirkins marketplace and a MetaBirkins exchange for the exchange of NFTs. I'm not exactly sure I know the difference between these two things are, however, that is clearly, that is not -- there's nothing about it that's artistic. That's promotion. That's using a trademark. And I believe that's all. If anything else comes to me --

THE COURT: I'll give you another shot in a minute.

MR. WARSHAVSKY: Okay.

THE COURT: Let me hear from moving counsel again.

MS. TUSHNET: So Hermès counsel expressed some uncertainty about what you call this. What you call is this is

an image. And indeed, Hermès' complaint repeatedly does.

Relatedly, the concept of commodity and the concept of work of art are not opposites. Your own bookshelves, your Honor, undoubtedly feature many commodities with standard exchange values that are fully protected by the First Amendment because they are books and art. Rothschild is asking with his art where does aura come from. The relationship between art and commerce has been a major subject for artists for decades, and the question that *Rogers* asks you to ask as a threshold question is, is this an expressive work or is he selling an ordinary consumer product like a can of soup? And the answer is clear and I don't think really contested here.

Relatedly, *Rogers* explicitly approved the marketing activity surrounding a film, and for good reason. And indeed, subsequent *Rogers* case like *Empire* and *AM General* have also done so explicitly.

Rothschild, like other artists, is allowed to tell you what he created. My esteemed colleague omits the things he's calling storefronts, web page, Twitter, Instagram, all of them about MetaBirkins telling you what he has created as an artist. And indeed, selling a picture is protected by the First Amendment. The fact that it sold for money does not change the level of First Amendment protection it gets. There are no nonconclusory allegations that these marketing uses are anything other than statements pointing to his authorship of

the MetaBirkins images. So for example, Exhibit AZ he calls MetaBirkins my previous project. That type of promotion is clearly allowed by *Rogers* itself.

In *Empire*, in fact, the defendants created an entire brand connected to the *Empire* TV show, including marketing performances by artists who had been featured on the show. In *louis Vuitton*, they marketed the movie with pictures of and references to Louis Vuitton. These results are logical because the protection granted by the First Amendment who makes the art also should allow artists to tell you what they have to offer.

So again, other cases that have granted motions to dismiss have included allegations about marketing, for example, *Brown v. Showtime Networks*, which we cite in our motion to dismiss, alleged a marketing strategy of promoting the plaintiff's appearance in the accused film. After that, I think there is not too much, although I want to make a couple of comments about some various points.

In terms of Rothschild complaining about counterfeits, he's created a copyrighted work, actually, he created 100 of them, he has the right to object to unauthorized copies, like the copyright of *Ginger & Fred* does, like Activision does very actively with *Call of Duty*.

And with respect to actual confusion, just a couple of points. The existence of questions online actually demonstrate that there's no explicit misleadingness. Because

if the misrepresentation were explicit, there would be no need to ask questions.

Relatedly, this is evidence of the effect not of whether the artwork itself is explicitly misleading, and no amount of implication adds up to being explicitly misleading. Indeed, counsel's own discussion of the assumptions that people are making demonstrates there's no explicit misleadingness.

Finally, and relatedly, the disclaimer can only create an issue of fact if you're performing regular *Polaroid* analysis. It cannot create an issue of fact as to explicit misleadingness. I think that basically deals with the other causes of action as well. I will just mention that for cybersquatting *Rogers* is a First Amendment test that carried out the necessary balancing, and therefore, both logically applies and informs your judgment of what counts as plausibly pleading something. It can't be bad faith to make a work that is protected by the First Amendment and tell people that you have made that work.

Relatedly, with dilution, along with First Amendment as a direct barrier to a dilution claim, there is an explicit exception for noncommercial uses, and as we explain in the briefing, the courts and Congress have been clear that noncommercial for the purpose of the dilution exception means what it means for speech. That is, is it speech that does something more than propose a commercial transaction? If it is

a thing that is, in fact, being sold to you, that is noncommercial speech, like the *New York Times*, like a Warhol painting, and like other kinds of art.

Thank you.

THE COURT: Thanks a lot. Let me hear finally from plaintiffs' counsel.

MR. WARSHAVSKY: Thank you, your Honor.

Your Honor, again, I know I said it before, I'm going to repeat it. I feel like some of counsel's argument is really more about a case they think we've pleaded but not apparent from the pleadings, and I would start with the issue that MetaBirkins are somehow commentary. I don't know where -- we read to you, I read to you earlier the defendant's interview. Not once did he say it's commentary. He says he's trying to replicate Birkin bags. It has nothing to do with commentary, and it's not in the complaint anywhere. His attorney -- on the other side -- maybe ultimately the facts will yield this, but not in the -- not in a lengthy complaint and all the exhibits that we've provided is there anything about commentary. And the notion that it's just a title for artwork really does ignore what's in the complaint. And again, I would take your Honor to the marketing of the other NFTs, which are called "I Like You You're Weird," or we refer to ILYYW, I think. That's marketed under the MetaBirkins trademark. MetaBirkins have become a d/b/a for Mr. Rothschild. It's not his name.

Turning to the books argument, I find it a curious one. Yes, a book is a commodity, but if I adopted your name, your Honor, and started publishing a book, certainly you'd be able to stop me. That's not a trademark case. I guess it would be a right of publicity type case. But ultimately, even in the *Rogers* case there's a discussion about the Jane Fonda book series and that you can't just turn the Jane Fonda workout into a set of books and say it's Jane Fonda books, Jane Fonda workout books, because that would be infringement.

And the Lanham Act generally, the Lanham Act does have its own fair use, which is meant to be the negotiation between the First Amendment and the Lanham Act.

In the *Rogers* case, I understand why counsel is leaning so heavily on it but this is not like -- factually it's just distinct. And what I think this case is much more like, your Honor, is your own case, *Chambers v. Time Warner*. And In *Chambers*, I assume you're familiar with it, but it is almost two decades old, so just for the record, what I'll say is that was the case where the plaintiffs were musicians, they brought a claim in what remained in the 2003 decision, and your Honor particularly in 2003 WL 7494922, where the plaintiffs brought a claim -- they're musicians, recording artists that brought a claim against MP3.com. And MP3.com was using the plaintiffs' names properly to identify an index the catalog, and the plaintiff said the use of their name suggested an endorsement

under the Lanham Act. The defendant responded that it was nominative fair use, which is slightly different, I'll admit, than the claim here. But the test is still the same, it's about likelihood of confusion. And your Honor allowed the complaint to go forward because you found that the plaintiff had alleged there was a likelihood of confusion. There was a likelihood that consumers would believe that the songwriters or musicians had, in fact, endorsed the MP3.com service. So too, here, we have an audience that believes that Hermès is behind the MetaBirkins.

And the defendant, Mr. Rothschild, has a whole world of names to pick from. Why did he choose the MetaBirkins name? Now we've heard a very nice discussion again from counsel about that it was commentary. I defy you to find that in anything that's been submitted as part of the complaint. But again, what I would say, at best there's a factual issue. I don't even think you could grant summary judgment at this point in light of the admission in the Yahoo article. I could point to the other evidence, but that Yahoo article in and of itself are the plaintiff's own words; he was doing it to emulate the Hermès Birkin brand, and he said it's blurry and he was trying to cash in on it because it's an iconic brand that he could trade its good will. And that's my commentary, he didn't say that last part.

What I will say, though, is what I find very

interesting is when counsel says, well, of course he could have stopped lookalikes. That is not what is in this article. It's about whether others could use the MetaBirkins name. And if Mr. Rothschild thinks that he could stop other people from using the MetaBirkins name, it means that it's because he believes it's his trademark. And he certainly, if you look through our complaint, he certainly is using it that way.

And so all we would say, your Honor, is take him at his word and listen to him and our complaint reads right across. I would challenge that it's conclusory allegations, but that's in front of your Honor to look at.

I don't know if there are other questions --

THE COURT: Both of you have very ably addressed most of the questions I had. I will give, if there's anything further that moving counsel wanted to say, I'll give her that opportunity.

MS. TUSHNET: Thank you, your Honor.

Since *Chambers* I don't believe is in the briefing, I will just say quickly and without too much time spent reviewing it, I will point out that right after *Chambers* came down, *Dastar* was decided, which clearly eliminated the theory of the case. So that does relate to the *Dastar* argument, which I'd be happy to talk about, but we've also briefed it.

The other things that counsel brought up I would say *Rogers* itself clearly rejects the adequate alternatives test as

insufficient to protect artists First Amendment interest. Titles can be integral parts of the work, they tell us how to interpret the works. And indeed, titles have trademark functions, which is why the Court in *Rogers* found the need to develop a special test. If they didn't have trademark functions, then we wouldn't be wondering about what is the extent of a trademark owner's right to control title. But because they are inextricably intertwined with the noncommercial elements, we do need a separate test regardless of their trademark function.

And just last, in terms of whether this is commentary, counsel read out Rothschild's statement that he was trying to find out where aura comes from.

Is luxury about reality or is it only about image? That's actually an artistic motivation. We think that makes it simple. Thank you.

THE COURT: Thank you very much.

I thank both counsel for this very helpful argument. Also, thank you for your proposed case management plan, which I will adopt, and of course it will be dependent on how I resolve this motion, but assuming for the sake of argument we do go forward, then that will be the governing schedule, and we will, in terms of the case management, we'll set down the final pretrial conference for November 4th at 4:00 p.m.

Since the first operative date is, in the case

management plan, is May 9th, I will get you by no later than Friday afternoon of this week a bottom-line ruling on this motion, so we'll know whether we go forward or not. I won't have time to write a full opinion, that will follow in due course, but you will at least know the bottom line and whether, therefore, we go forward or not.

So I think that covers everything on my list; anything else counsel needed to raise?

MR. WARSHAVSKY: Not from the plaintiff, your Honor. Thank you.

MS. TUSHNET: No, your Honor. Thank you.

THE COURT: Thanks very much.

That concludes this proceeding.

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